2012 WL 1069974 (La.App. 5 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fifth Circuit.

Gordon HANDY, Plaintiff/Appellant,

v.

THE CITY OF KENNER SECOND HARVEST FOOD BANK OF GREATER NEW ORLEANS & ACADIANA, and XYZ Insurance Company, Defendant/Appellees.

No. 12-CA-135.
March 21, 2012.

Appeal From the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, Division "B", Docket No. 626-647, Honorable Cornelius E. Regan, Judge, Presiding

Original Brief on Behalf of Plaintiff/Appellant, Gordon Handy

Shearman-Denenea, L.L.C., Brian G. Shearman (#19151), William N. Hazlaris (#01950), 4240 Canal Street, 2nd Floor, New Orleans, LA 70119, Telephone: (504) 304-4582, Attorneys for Plaintiff/Appellant, Gordon Handy.

A CIVIL PROCEEDING

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CASES:

***1** *STATEMENT OF JURISDICTION*

The appellate jurisdiction herein is vested in this Honorable Court under Article V, Section 10, of the Louisiana Constitution of 1974, as amended, vesting in all courts of appeal, appellate and supervisory jurisdiction over all civil cases arising from the various lower courts within their respective judicial appellate districts. This jurisdiction in civil cases extends to both law and facts under Article V, Section 5(c) of the Constitution.

***2** *STATEMENT OF THE CASE*

This case arises from a personal injury action filed by the plaintiff/appellant, Gordon Handy, for injuries sustained by him when, on February 14, 2005, while pushing a grocery cart and exiting a food bank at 1610 Third Street in Kenner, Louisiana, premises owned and operated by the defendant/appellee, City of Kenner, he struck his head on the bottom of the stairwell which was protruding down into the exit passageway. The plaintiff filed suit against the defendant, City of Kenner, and its insurer, Clarendon America Insurance Company.

ACTION OF THE TRIAL COURT

This matter proceeded to trial on the merits before the Honorable Cornelius E. Regan, Division "B", in the 24th Judicial District Court for the Parish of Jefferson on July 7, 2011. The trial was held open until the parties were able to submit a post-trial deposition of a physician, and the matter was formally taken under advisement on August 17, 2011. On September 30, 2011, His Honor rendered Judgment in favor of the defendant, City of Kenner, and against the plaintiff, Gordon Handy, dismissing the plaintiff's claims. It is from that Judgment that plaintiff, Gordon Handy, now appeals devolutively.

***3** *STATEMENT OF THE FACTS*

The accident in question occurred on February 14, 2005 at a building owned and operated by the defendant City of Kenner, which was being utilized as a food bank. The premises at 1610 Third Street in Kenner, Louisiana had been acquired by the City of Kenner in 1997 and had remained in the custody and control of said defendant from that date through the date of plaintiff's accident. The defendant stated that it never made any alterations to the premises since its acquisition and provided no records of maintenance or inspections of the property, despite formal requests for such information.

Plaintiff, Gordon Handy, at the time of the accident was a 44 year-old man who worked as a laborer, most regularly as a diesel mechanic. He was unemployed at the time and was making a rare visit to the food bank. While pushing a grocery cart and exiting the premises, he struck his head on the bottom of the stairwell which was protruding down into the exit passageway. The clearance height under the stair landing was inadequate to accommodate plaintiff's height and was in violation of both the Parish building code when the premises were erected in 1952, as well as the current building codes. No warning or caution signs existed at the time of the accident to alert visitors of the premise defect. Furthermore, the stairway ceiling was slanted downward lessening the clearance height as one proceeded out the exit door and was uniformly painted a gray color. This created an illusion to unsuspecting visitors that the clearance was greater than it actually was.

After striking his head, Mr. Handy fell to the floor, bracing his fall with his hands. He became disoriented and may have blacked out for a few seconds. He testified that a young pregnant woman assisted him and escorted him back inside the food bank, where he advised a woman at the counter that he had hit his head. The food bank representative treated him rudely and told him to leave. He was not asked to sign an incident or accident report, despite the fact that one was later issued.

As a consequence of this accident, plaintiff sustained serious injury to his head, neck and hands. He sought medical treatment a day or two following the accident at Charity Hospital (LSU Health system) in New Orleans and continued with medical treatment there until Hurricane Katrina hit. Subsequently, he moved to Shreveport where he resumed treatment for bilateral carpal tunnel syndrome and multiple disc problems in his neck. On September 25, 2008, he ultimately underwent a three-level cervical fusion, which was performed by Dr. Euby Kerr. Dr. Kerr testified by ***4** deposition that this surgery was causally related to the plaintiff's February 14,2005 accident wherein he hit his head. Mr Handy also underwent five surgical procedures on his hands, including bilateral carpal tunnel releases. He is currently recovering well from his neck surgery, but continues to have difficulty with his hand injuries.

***5** *ISSUES PRESENTED FOR REVIEW*

1) Does a low-hanging stairway protruding into an entranceway, which a) is painted uniformly like the surrounding walls and slants downward lessening the clearance height as one proceeds out the door creating an illusion to unsuspecting visitors that the clearance is greater than it actually is; b) does not display any warning or caution signs to alert patrons of the low clearance; c) contains no lighting, thus limiting visibility; and d) violates Parish building codes as to its height dimensions; create an unreasonable risk of harm to individuals, such as plaintiff/appellant, Gordon Handy, utilizing the entranceway?

2) Despite defendant's stipulation that building codes were violated, is expert testimony regarding the building code violations and the safety reasons for those codes being promulgated admissible?

6** ***ERRORS COMMITTED BY THE LOWER COURT

1. The trial court was clearly wrong in finding that the defect in the stairwell of the food bank did not pose an unreasonable risk of harm to the plaintiff/appellant.

2. The trial court erred in not allowing plaintiff's architectural expert, Ladd Ehlinger, to testify as to building code violations which were germane to the plaintiff's case, and the human factors that determine building code requirements.

*7 *ARGUMENT*

1. Unreasonable Risk of Harm

Under Louisiana Revised Statute 9:2800, a public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody. For damages to be imposed, the public body must also have actual or constructive notice of the defect causing the damage prior to the occurrence, and must have a reasonable opportunity to remedy the defect and fail to do so. La R.S. 9:2800(C). Louisiana courts have incorporated these elements into a test to determine if a claim against a public entity, such as the City of Kenner, will prevail. The plaintiff must establish: (1) the entity's custody or ownership of the defective thing; (2) that there was a defect and the defect created an unreasonable risk of harm; (3) the entity's actual or constructive notice of the defect and failure to take corrective action within a reasonable time; and (4) causation. *Woods v. City of New Orleans, et al*, 871 So.2d 1222 (La. App. 4 Cir. 2004); *Johnson v. City of Monroe*, 870 So.2d 1105 (La. App. 2 Cir. 2004), writ denied 876 So.2d 843 (La.2004); *Oster v. DOTD, State of Louisiana*, 582 So.2d 1285 (La.1991). All these elements, it is suggested, were satisfied in the present case.

The defendant, City of Kenner, admitted in its discovery responses and stipulated for trial that it had ownership of the building where the food bank was operating, and that it had *custody and control* of the premises at the time of Mr. Handy's accident. The trial judge found no dispute in this matter and therefore, this element is not an issue before this Honorable Court.

Passing over the *unreasonable risk of harm* and *notice* elements for the moment, it must be acknowledged that the issue of *causation* is also not before this Honorable Court as the lower court did not address causation upon determining, wrongfully in plaintiff/appellant's view, that the building defect at the food bank did not constitute an unreasonable risk of harm. Suffice to say, plaintiff/appellant contends that he met his burden of proof on the causation issue. The evidence produced at trial indicated that Gordon Handy was in good health and working as a diesel mechanic prior to his accident and that the symptoms of the injuries to his neck, hands and wrists commenced immediately after the accident and continue to manifest themselves to this day. This evidence was not refuted. His treating physicians causally related his injuries to the accident of February 14, 2005, and even defendants' medical expert had to admit to the possibility of a causal connection, ***8** satisfying the standard set forth in *Housley v. Cerise*, 579 So 2d 973 (La. 1991). In light of this evidence, plaintiff urges that he met his burden of proving that his injuries were causally related to the defective condition and the resulting accident made the basis of this litigation.

The issue of whether or not the height defect in the passageway created an *unreasonable risk of harm* to the public and specifically, to Gordon Handy, is at the heart of this appeal. The determination of whether a defect presents an unreasonable risk of harm involves factual findings which differ in each case. Thus, there is no fixed or mechanical rule for determining this. *Reed v. Wal-mart Stores, Inc.*, 708 So.2d 362 (La. 1998); *Lawrence v. City of Shreveport*, 948 So.2d 1179 (La. App 2 Cir. 2007). The unreasonable risk of harm analysis requires the trier of fact to balance the gravity of risk of harm against individual and societal rights and obligations, the thing's social value and utility, and the cost and feasibility of repairing the defect. *Reed v. Wal-Mart Stores, Inc., supra.* Another factor to be considered is the burden of adequate precautions. *Dupree v. City of New Orleans*, 765 So. 2 ND 1002 (La. 2000).

Clearly the facts of this case on appeal indicate a defective condition that created an unreasonable risk of harm. The entrance/exit passageway from the building used as a food bank was measured by plaintiff's architectural expert, Ladd P. Ehlinger, to be $5' 10.5''$ in clear height (*Trial Record Volume 1, page 167).* This height violated the clear height requirement of $7'$ in the 1952 Jefferson Parish Building Code, $6' 8''$ of the current life Safety Code, and $7' 6''$ of the current Jefferson Parish Building Code. These building code violations were stipulated to by the City of Kenner. The height defect was egregious and arguably presented a danger to anyone taller than $5' 10.5''$. Mr. Handy, who stands conservatively at $6' 4''$, was severely at risk for the bodily harm that ultimately occurred.

Defendant argued at trial that the plaintiff had the duty to exercise care and should have seen the defect. This argument ignores the details which reflect that the defective condition was not “open and obvious” to a person of Mr. Handy's height. The stairwell

ceiling was uniformly painted gray and did not delineate a change in the passageway's clearance height. There was no indication or warning that the ceiling was lower as one advanced through the exit. The stairway ceiling was slanted downward lessening the clearance height as one proceeded out the exit door, creating an illusion to unsuspecting visitors that the clearance was greater than it actually was (*Trial Record Vol. 1, p.197).* Exacerbating the dangerous condition further was the absence of any lighting, which ***9** could have assisted patrons navigating through the stairwell (*Trial Record Vol. 1, p. 171*). To these conditions add the fact that Mr. Handy was given a grocery cart with wobbling wheels (*Trial Record Vol. 2, p. 253*) to push and maintain control of while exiting through the passageway and it becomes easy to understand why Mr. Handy could not appreciate the danger he encountered and why the situation was not "open and obvious" to him.

Q: Okay. When you were walking out, sir, did you notice this overhang at all?

A: No, because it seemed like I could walk through it, but when I finally went back in and I came back out I realized it was an illusion. It was tapered, and it all was the same color. It looked like you could just walk through it, but it was beneath. It was coming down. Instead of it being square and you look like you could walk through it, it was coming down, and that's what made me run into it just like it was a wall there. (*Trial Record Vol. 1, pp. 196-197*)

Q: At this point you saw the overhang, right, or you saw the stairwell?

A: It is an illusion. You can't see the overhang because it is an illusion.

Q: Whatever you saw in front of you made you think that you wouldn't have any problem going through there?

A: Positively. (*Trial Record Vol. 2, p. 253*)

Q: Now did you notice that the area beneath where this caution sign is now located had old yellow or gold paint that was chipped?

A: No.

Q: You don't remember that?

A: It wasn't like that.

Q: It wasn't like that?

A: There wasn't no caution sign or no yellow. It was all one color. That's where the illusion come in at. It was all one color, and then it was wedged so it looked like you could walk through it, but as you begin to walk you are running straight into it. (*Trial Record Vol. 2, p. 257*)

Even more egregious was that despite the fact that the feasibility of correcting the defect was minimal as compared to the gravity of the harm presented, no accommodations were made to protect ***10** the general public. Caution and/or warning signs could easily and inexpensively have been utilized to alert visitors to the defect in the ceiling. The feasibility of such a measure is supported by the fact that the defendant posted a large noticeable caution sign in the passageway subsequent to Mr. Handy's accident (*Plaintiff's trial exhibit #4, photos*). This subsequent remedial measure, although not generally admissible to prove wrongful conduct, *was* admissible in this case, as an exception to *Louisiana Code of Evidence Article 407*, in that it was offered to show the feasibility of correcting the premise defect at minimal cost and with little burden. Such evidence was intrinsic to plaintiff satisfying the unreasonable risk of harm analysis.

Furthermore, detour signs could have been utilized directing visitors around this particular exit ramp. Mr. Handy testified and the evidence indicated that there was a way in and out of the building just around the side of the passageway in question. Mr.

Handy testified that he entered and exited by that method on his only previous visit to the food bank (*Trial Record Vol. 1, pp. 191-193*). Blocking or prohibiting use of the defective passageway would have been an easy, safe and efficient alternative to the dangerous condition that existed and would have eliminated the unreasonable risk of harm. The burden of these adequate precautions would have been minimal.

There was no dispute that the stairwell where the accident occurred violated Parish building codes when the City acquired the premises eight (8) years prior to this accident, as well as those in effect at the time of the accident. In fact, the defendants City of Kenner and Clarendon Insurance Company stipulated to these safety violations at trial. It is a well-established precedent under Louisiana law that violation of a statute or ordinance constitutes negligence. *Burns v. CLK Investments V, L.L. C., et al,* 45 So. 3d 1152 (La. App. 4 Cir. 2010), writ denied 52 So. 3d 886 (La. 2011). Violation of a safety statute is civil negligence, but is actionable only when it is shown that failure to follow a statute was a legal cause of the accident. *Martyniuk v. DL-Mud, Inc.,* 526 So. 2d 846, 848 (La. App. 1 Cir. 1988), writ denied 531 So. 2d 276 (La. 1988); *Nolan v. Jefferson Downs, Inc., et al,* 592 So. 2d 831 (La. App. 5 Cir. 1992); *Armour v. Armour,* 541 So.2d 371 (La. App. 2d Cir. 1989); Burns, supra. A statute generally imposes a duty; and if violation of that duty results in the harm the statute was designed to prevent, then there is liability. *Pierre v. Allstate Insurance Company,* 242 So.2d 821 (La.1970); Nolan, supra. Additionally, courts have stated that statutory violations provide guidelines for civil liability. *Galloway v. State, DOTD,* 654 So.2d 1345 (La. 1995); Burns, supra.

***11** It is obvious that building codes establish minimum standards to ensure the safety of the public. It can be reasoned that the Jefferson Parish Building Code has set a clearance height of $7' 6''$ for a stairwell entrance such as that on the premises used by the Kenner food bank in order to prevent the exact harm that Gordon Handy sustained: striking one's head on the low overhang. The fact that Mr. Handy is $6' 4''$ tall does not relieve defendant/appellee of liability. He was as entitled to protection from a dangerous condition as were those patrons of shorter stature.

As previously stated, the violation of this standard was egregious. Having knowledge of the substandard condition and failing to rectify it was a blatant disregard for the welfare of the persons who visited the food bank. To have allowed such a condition to remain is inconceivable.

The *notice* requirement of Louisiana Revised Statute 9:2800(C) must be addressed in conjunction with any discussion of unreasonable risk of harm for they are integrally intertwined in this matter. In his Findings of Fact and Reasons for Judgment, the trial judge referred to the fact that there had been no prior complaints regarding the stairwell (*Trial Record Vol. 1, p. 145*). From this, he concluded that the stairwell was an open and obvious condition and did not create an unreasonable risk of harm. Plaintiff/appellant submits that just because no accidents were previously reported should not yield the conclusion that the defect was open and obvious to all and that the City of Kenner was unaware that a risk of harm was present.

Under La. R.S. 9:2800, constructive notice is defined as the existence of facts which imply actual knowledge. This definition allows for the inference of actual knowledge to be drawn from the facts demonstrating that the defective condition had existed for such a period of time that it should have been discovered and repaired if the public entity had exercised reasonable care. *Lawrence v. City of Shreveport,* 948 So.2nd 1179 (La. App. 2 Cir. 2007); *Johnson v. City of Bastrop,* 936 So. 2d 292 9 (La. App. 2 Cir. 2006). The City of Kenner had owned the building in question for approximately 8 years prior to the plaintiff's accident. Inspections at the time the building was bought, as well as reasonable periodic inspections through the subsequent years, would have undoubtedly revealed the height defect in the passageway and the violations of the building codes. The defendant cannot deny this. That the City of Kenner claims not to have had knowledge of the building's condition is an illogical premise, and the only question that remains is why it failed to rectify the defect when it decided to open up the building again to the public.

***12** Defendant presented testimony at trial that since there were no reported prior accidents concerning this defect that it is relieved from liability for lack of notice. However, if a condition is dangerous and creates an unreasonable risk of harm, is it not reasonable to expect that a first accident will occur at some time? Is a public body allowed one free pass from culpability even when it actually knew of the danger? It would be extremely unfair and unjust to not allow the first victim to recover his damages

just because an accident had not previously occurred, even though the premise owner had notice, actual or constructive, of the defective condition.

The City of Kenner was well aware that the clearance height in the stairwell was too low and violated building standards and codes, and therefore, stipulated to such before the Court in order to avoid having plaintiff present damaging testimony through his expert regarding the importance of the code standards and the danger the violations presented. The City knew or should have known at the time it acquired the old school building that the stairwell did not meet building code standards and was not adequate to be used as a method of public ingress or egress to the building. It should have corrected the defective condition prior to allowing and directing public use through that opening. The entranceway under the stairs should have been blocked off and pedestrian traffic should have been directed around the stairwell to the doorway. This was an inexpensive and very feasible alternative, evidenced by the fact that it was operated in such a fashion subsequent to plaintiff's accident.

The City of Kenner admitted there were no warning or caution signs to alert patrons of the low clearance. It maintains, though, that there existed a band of yellow paint on the overhang, both inside and outside the stairwell. If there was at one time a band of yellow paint on the overhang, as the City of Kenner contends, that caution paint had become ineffective due to age, weather and lack of maintenance. The photographs introduced at trial reveal that this yellow paint, if it in fact existed at the time of the accident, was so old, worn and flaked, that it rendered the painted area unnoticeable and useless as a warning to those walking through the entranceway. In fact, both plaintiff Gordon Handy (*Trial Record Vol. 2, pp. 255, 257*) and Ms. Pat Butler (*Trial Record Vol. 2, pp.283-284*) testified that when exiting the food bank through the stairwell, one's focus is forward and out the door, and there was nothing to draw one's attention to the ceiling above.

In light of the defendant's position the question that must be asked is, if the City of Kenner believed the height defect was “open and obvious” and that it owed no duty to the public to protect ***13** against such a hazard, why was the stairwell overhang allegedly painted yellow above the passageway as defendant vehemently argued it was? The answer is obvious and undeniable: the City recognized the danger and harm the defect posed and attempted unsuccessfully to provide a warning. It is ironic that the City of Kenner would first claim it had no notice of the danger presented by the overhang; then, it reverses its position by arguing that it did have a yellow strip painted on the stairwell, thereby admitting realization of the risk presented. It should not be allowed to seek sanctuary within the shelter of an “open and obvious” defense under these circumstances.

In summary, the trial judge determined that the stairwell was an open and obvious condition which did not present an unreasonable risk of harm. As previously stated, according to his Findings of Fact and Reasons for Judgment, this was based on testimony stating there had been no prior complaints lodged regarding the stairwell, as well as the testimony of Ms. Patricia Butler that she had no difficulty seeing the stairwell landing, and the testimony of Gordon Handy that he had visited the food bank on a previous occasion. It is respectfully submitted that this determination constituted manifest error.

It has been previously pointed out in this brief that although the record reflects no prior complaints, it is clear that the City of Kenner was well aware of the height defect in the stairwell and by its own admission recognized the risk of harm by arguing that yellow paint had been painted on the overhang.

As for Ms. Butler's testimony, it was as follows:
Q: I think you answered this three times, but I'm going to ask you again. When walking out the food bank did you notice the overhang where the caution sign is? I know the caution sign wasn't there.

A: No

Q: Why is that?

A: Because I'm focusing on getting my basket out. I'm going straight to my car, because it is a lot and I'm trying to focus on getting to my car with my basket.

Q: Were there any reasons for you to have to notice that?

A: No. (*Trial Record Vol. 2, pp. 283-284*)

***14** Ms. Butler's testimony actually supported Mr. Handy's case in that although she could see the overhang, there was no reason to take notice of it as her concentration and focus, and one would assume that of the other patrons, was on pushing her cart forward and not on what was above her head. Such focus created no risk of harm for her as she was only 5′7 1/2″ tall. The same could not be said for Mr. Handy whose height subjected him to the danger that befell him.

Next, the trial judge relied on the fact that Mr. Handy had visited the food bank previously, the implication being that he should have been aware of the defective condition. With all due respect to the trial judge, this implication is based on a faulty premise. Mr. Handy's one visit to the food bank did not lead him through the passageway at issue. He went around the stairwell, not through it, since he had no need to use a grocery cart. He had never used or noticed the defective stairwell prior to the date of his accident.
Q: And after the accident happened and you went out and looked at this scene, yo looked at the area, you looked up and saw that you were too tall to go under it walking straight; is that true?

A: Yes, it is.

Q: And that was the first time that you had noticed that, because you had gone through that area before, you had gone around to the right or the left of the stairwell, true?

A: That's correct. (*Trial Record Vol. 2, p. 256*)

For these reasons, it is submitted, the trial judge's findings were manifestly erroneous and incorrectly resulted in a determination that no unreasonable risk of harm existed.

Further, the trial judge's determination is clearly wrong from a public policy perspective. It is understandable for a property owner to be protected when a condition in his/her property is “open and obvious” to the public and the owner has no notice of the defect. But, to allow a property owner to ignore defective conditions of which he/she is well aware, under the argument that they are “open and obvious”, would yield undesirable and maybe even catastrophic results. A property owner would never have motivation to repair or correct a defective condition in his/her property and this would be detrimental to public safety. Dangerous conditions could be **neglected** or exacerbated as long as they were not completely hidden. The more hazardous the condition, or the more severe ***15** the building code violations are, the less responsibility the property owner would have to the public. Such an absurd result cannot be advocated.

Finally, plaintiff/appellant, Gordon Handy submits that Louisiana jurisprudence provides guidance as to determinations of unreasonable risk of harm in circumstances similar to those in the present case. In *Burgess v. City of Shreveport*, 471 So.2d 690 (La. 1985), the plaintiff fell at a fire station which had been designated as a polling place for elections. The **elderly** Mrs. Burgess fell as she was attempting to pass through an inner doorway which required a six inch step down. In affirming the trial court's determination that the condition of the doorway created an unreasonable risk of harm, the Supreme Court relied on the evidence “that the lighting at this place was inadequate and that the floors of the two rooms appeared to be level because they were painted the same hue. There was no warning sign or hand rail. Although an entrance at the back of the engine room on the same level was available, voters were not directed to this safer alternative.” *Burgess, supra, at p. 692.* The Court further found that reasonable inspections of the premises would have indicated that the pathway was unreasonably dangerous and the failure to inspect was a breach of the public entity's duty to the public.

The circumstances in the *Burgess* case are strikingly similar to those presented in the case before this Honorable Court. The building in which Mr. Handy was injured was being used for a purpose other than for which it had been built. Yet, no accommodations were made to prepare it for public use as a food bank, although reasonable inspections would have indicated the height defect in the passageway and demanded repair. Just as in *Burgess*, the lighting in this case was inadequate and, most importantly, the slope of the ceiling appeared to be of uniform height because it was all painted the same gray color. This created a dangerous illusion that one could pass safely through the exit. At 6 feet 4 inches in height, Mr Handy did not appreciate the unapparent danger and struck his head. Also, no warning signs existed. Clearly, this defect was no more "open and obvious" than the one encountered by the plaintiff in *Burgess.* Furthermore, the defendant, City of Kenner, like the defendant public body in *Burgess*, failed to utilize the safer alternative method of egress that was available. Patrons could have been directed around the stairwell as was subsequently done. Considering the obvious similarities between these cases and the findings in *Burgess*, it is submitted that the trial court below committed manifest error in not determining that an unreasonable risk of harm existed at the City of Kenner food bank.

***16** The case of *Sistler v. Liberty Mutual Insurance Company*, 558 So.2d 1106, (La. 1990), provides further support for plaintiff/appellant's position. In *Sistler*, the Louisiana Supreme Court once again agreed with the trial court's finding of unreasonable risk of harm in a case involving an entranceway defect. The plaintiff therein tripped and fell over a one inch high elevated portion of a restaurant floor between the entrance and the foyer. Although the defendant argued that the plaintiff should have observed what a reasonable and prudent person would have observed, and presented testimony that no other incidents of tripping and falling had taken place since building operation had commenced, the trial court concluded that the entranceway created an unreasonable risk of harm to patrons and awarded damages to the plaintiff. The court relied on evidence that both levels of the floor were the same color which presented a safety problem and created "an illusion of only a single level", *Sistler, supra, at pp.1113-1114*, much like the illusion presented to Mr. Handy where the stairwell's change in elevation was masked by the uniform paint and no warning signs.

The court in *Sistler* went on to point out that the lack of warning paint or signs failed to warn patrons to look down. The court noted that the plaintiff was somewhat familiar with the restaurant as she had been there on previous occasions, but was not a regular patron with intimate familiarity of the entranceway. When she entered the restaurant foyer she had been looking in front of her instead of down, just like Mr. Handy had testified he had done at the food bank (*Trial Record Vol. 1, p. 255).* And, as in Mr. Handy's case, "no signs, warnings or indicators, drew her attention to or notified her to look down or to be wary of the change in elevation." *Sistler, supra, at p.1114.*

The *Sistler* court accepted the testimony of plaintiff's expert who stated that changes of elevation can catch people offguard and "can affect their locomotion or walking activity. If the changes in elevation aren't readily apparent, most people don't consistently accommodate those changes unless there's some clue or some perception that is a threat to them..." *Sistler, supra at pp. 1109-1110.* Although the testimony *in Sistler* involved floor elevation, it is submitted that the same analysis could and should be made regarding ceiling elevation, as in the case on appeal herein. In fact, Mr. Ladd Ehlinger, plaintiff/appellant's architectural expert similarly testified as to the importance of considering the mechanics of walking and how people move through space in determining safe building designs (*Trial Record Vol. 1, pp. 169-170*).

Lastly, the court in *Sistler* recognized that all invitees do not automatically look down when entering the premises, and the cost of preventing accidents, such as the one that occurred, by posting ***17** warnings at the entranceway is minimal. The same logic is precisely applicable to the case on appeal herein. Consequently, it is submitted, the determination of the trial court below in not finding that an unreasonable risk of harm existed at the food bank stairwell was clearly wrong, or manifestly erroneous.

Louisiana appellate courts have also determined the trier of fact to be clearly wrong in cases involving an unreasonable risk of harm from building defects. In *Vigh v. State Farm Fire & Casualty Insurance Company, et al*, 706 So. 2d 480, (La App. 4 Cir. 1997), the Fourth Circuit Court of Appeal reversed a finding by the jury that the plaintiff in that case was comparatively at fault when she tripped and fell in a restaurant entranceway due to a defective condition that violated building codes. Defendant's

position that Ms. Vigh was careless and should have better observed where she was walking had apparently been accepted by the jury. Although the appellate court acknowledged that great deference was owed to the trier of fact, it substituted its conclusion that defendants were 100% liable for the unreasonable risk of harm that caused the plaintiff's injuries. The Third Circuit Court of Appeal in *Head v. St. Paul Fire & Marine Insurance Company, et al,* 408 So. 2d 1174 (La. App. 1982) writ denied, 41 So. 2d 99 (La 1982) responded similarly, reversing the trial court and concluding that the decision below was clearly wrong in finding no unreasonable risk of harm was presented in an uneven hospital entranceway. Plaintiff/appellant cites to these cases as jurisprudential precedence to support his contention that the trial judge's determination should be reversed, and that such reversal is justified.

2. Testimony of Architectural Expert, Ladd P. Ehlinger

Although defendants stipulated at trial that the stairwell violated Parish building codes, plaintiff sought to elicit testimony from his expert regarding the violations and the harm to the public that the building codes were promulgated to protect against. Defense counsel objected to such testimony and, plaintiff/appellant contends, the Court erroneously sustained the objection (*Trial Record Vol. , pp. 167-169*).

It is obvious that defense counsel stipulated to the building code violations to minimize the damaging evidence against his client. It is one thing to acknowledge that a condition is in violation of specific code provisions, statutes, ordinances or regulations, and another thing entirely to have to refute an extensive discussion and explanation as to the extent of the violations and the impact on ***18** public safety. Recognizing this, defendants stipulated that the entranceway to the food bank violated the height requirements of the building codes and objected to any further mention of the issue. However, plaintiff/appellant submits that testimony evidence regarding the confirmed violations was admissible and, furthermore, critical to his case. Testimony from expert, Ladd P. Ehlinger, whose expertise in the field of architecture made him uniquely and eminently qualified to address building code requirements, would have shed light on the purpose of the building codes and the harm they are designed to prevent. Plaintiff/appellant contends that such testimony, if admitted into evidence, would have supported his position that the stairwell as it was utilized created an unreasonable risk of harm to a tall patron such as himself.

The height standards established in the building codes were designed to prevent the harm that ultimately befell Gordon Handy in this case. Mr. Ehlinger did testify that the passageway maintained an insufficient head height (*Trial Record Vol. 1, p.167*). Mr. Ehlinger's further testimony, if allowed, would have elaborated on this point and his expertise would have yielded the opinion that the stairwell at the food bank was inadequate for use as a passageway and resulted in a threat to public safety. The accident involving Mr. Handy was ultimate proof of this and was a logical and likely consequence of the building code violations.

Mr. Ehlinger has testified as a forensic expert many times and has been qualified as an expert in the field of architecture, including how people move through spaces and the causation of accidents as they relate to building codes. At trial, defense counsel cited the cases of *Burns v. CLK Investments V, LL.C., et al,* 45 So. 3d 1152 (La. App. 4 Cir. 2010) and *Vigh v. State Farm Fire & Casualty Insurance Company, et al,* 706 So. 2d 480 (La. App. 4 Cir. 1997) in support of his objection that Mr. Ehlinger's testimony regarding building code violations was inadmissible (*Trial Record Vol. 1, p. 168*). Reliance on those cases was grossly misplaced, for in both cases this particular expert *was* allowed to testify as to violations of the pertinent code provisions. Moreover, Mr. Ehlinger was correctly allowed to express his opinion that the building defect presented an unreasonable risk of harm. *Burns, at p. 1164.* The trial judge in the instant case, however, sustained defense counsel's objection (*Trial transcript Vol. 1, p. 169*), thus denying plaintiff/appellant from eliciting testimony from Mr. Ehlinger for the record that the condition of the passageway at the food bank constituted an unreasonable risk of harm. Plaintiff/appellant submits that the trial court's action in that regard was manifestly erroneous. Considering the fact that Mr. Ehlinger's testimony ***19** was uncontroverted by any defense expert, the court's ruling denied a critical aspect of plaintiff's case from being heard.

Plaintiff/appellant, Gordon Handy, further suggests that his architectural expert's opinion testimony was admissible under the rules of evidence. Under *Article 702 of the Louisiana Code of Evidence*, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert... may

testify thereto in the form of an opinion or otherwise." Also, *Louisiana Code of Evidence, Article 704* states that "[t]estimony in the form of an opinion or inference otherwise inadmissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact." Although the trial judge was not necessarily bound by the opinion evidence of plaintiff's expert, this testimony certainly should not have been excluded. It is submitted that Mr. Ehlinger's opinion, due to his expertise in architectural design and his practical considerations of how people move through spaces, would have shed light on why the defect should not have been considered "open and obvious" and would have been beneficial to the court in determining whether an unreasonable risk of harm existed. Opinion testimony from this expert involving the building code violations and the conditions that existed in the passageway, plaintiff/appellant strongly argues, would have yielded the conclusion that the building defect was not "open and obvious" to Gordon Handy.

3. Standard of Review

The Louisiana Supreme Court has pronounced that the ultimate determination of unreasonable risk of harm is subject to review under the manifest error standard. *Burns, supra; Reed v. Wal-Mart Stores, Inc.,* 708 So. 2d 362 (La. 1998). It is understood that the findings of a trial court should be afforded deference in that the trier of fact is usually in the best position to weigh and evaluate evidence that is presented. A determination of the trial court must be "manifestly erroneous" or "clearly wrong" to be overturned. *Reed, supra; Burns, supra.*

In the present case, plaintiff/appellant submits that the trial judge was clearly wrong and committed manifest error in not allowing plaintiff's expert to testify as to the building code violations and to provide his opinion in connection with the unreasonable risk of harm that resulted therefrom. In sustaining defense counsel's objection to the expert's testimony, the trial judge relied on cases cited by defense counsel that held contrary to what defense counsel stated. Previous courts ***20** *had,* in fact allowed Mr. Ladd Ehlinger to testify as to building code violations and to present his opinion on the issue of unreasonable risk of harm. Considering that Mr. Ehlinger was the only expert to testify at trial, his testimony would have produced unrefuted evidence and would have assisted Gordon Handy in meeting his burden of proof.

Additionally, the trial judge was clearly wrong in his determination that the defect in the passageway at the City of Kenner food bank was open and obvious. His determination was impacted by the fact that Mr. Handy had visited the food bank on one previous occasion and that his friend and neighbor, Patricia Butler stated that she did not have any difficulty seeing the stairwell landing. (*Trial Record Vol. 1, p. 145*). However, on the one previous occasion that Mr. Handy visited the food bank, he did not use the passageway in question and was experiencing its conditions *de novo* when he was injured. As for Ms. Butler, although she admitted being able to see the stairwell landing, her testimony was that she did *not* see the overhang, but was focused on going straight out to her car (Trial Record Vol. 2, pp.283-284). Furthermore, for the reasons previously stated in this brief, it is maintained that the defect was definitely not open and obvious to Mr. Handy and would not have been to anyone of comparable height. It was manifest error for the trial court to have found otherwise.

CONCLUSION

Plaintiff/appellant, Gordon Handy, submits that he met his burden of proof through the evidence presented at trial to impose liability on the defendant/appellee, City of Kenner, under Louisiana Revised Statute 9:2800. He established (1) custody or ownership of the defective thing; (2) that there was a defect and the defect created an unreasonable risk of harm; (3) the defendant's actual or constructive notice of the defect and failure to take corrective action within a reasonable time; and (4) causation. The determination of the trial court that the height defect in the passageway at the City of Kenner food bank was open and obvious and did not create an unreasonable risk of harm was contrary to the evidence presented and constituted manifest error. Additionally, the ruling by the trial court to not allow plaintiff/appellant's expert to testify as to the building code violations and address the issue of unreasonable risk of harm was clearly wrong or manifestly erroneous. Therefore, the Judgment of the trial court should be reversed.

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